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UNFAIR COMPETITION IN USING MANUFACTURER'S TRADE-MARK, REPUTATION AND GOOD WILL IN UNAUTHORIZED SALES OF HIS PRODUCTS.

In Ford Motor Co. v. Benjamin E. Boone, Inc., 244 Fed. 335, decided by Ninth Circuit Court of Appeals, and in Robert H. Ingersoll & Bro. v. Hahne & Co., 101 Atl. 1030, decided by New Jersey Chancery Court, reference is made to Motion Picture Patents Co. v. Universal Film Co., 243 U. S. 502, 37 Sup. Ct. 416, 61 L. ed. 871, and Straus v. Victor Talking Mach. Co., 243 U. S. 502, 37 Sup. Ct. 412, 61 L. ed. 871.

These cases are those overruling Henry v. Dick, 224 U. S. 1, which held that a patentee could by notice limit the price of his patented article in future resales. But the New Jersey court said, that while it would treat a U. S. Supreme Court ruling with great respect, it would not blindly follow it, unless there was some article of interstate commerce involved. The Circuit Court of Appeals did not think such a contract as was before it was at all controlled by any of the Supreme Court rulings.

The question in both of the cases was held rather to concern unfair competition as to sale of products of manufacturers. Thus, in the Ford Motor Co. case, there were agency contracts and agreements therein for shipments being made direct to authorized agents at 85 per cent of list value, an agent in addition to be allowed commission, in accounting with the company, the agents obligating themselves not to sell to ultimate purchaser except at list prices. Though the agent had full authority to sell, where a car was shipped to him on receipt of 85 per cent of the list price, the agent additionally paying freight from factory, yet it was stated that the company retained title, as upon conditional sale.

In the Ingersoll Co. case there were no agents for the sale of its watches, but there was requirement that purchaser from it should sell at resale for a certain price.

In both cases there was reliance by plaintiffs on trade-marks and averment of unfair competition in using trade-mark, and reputation in resale to customers at less than list prices. In New Jersey, reliance to prohibit this was upon a statute making unlawful any appropriation by another of trademark or reputation or by price inducement to depreciate the value of any product. The Motor Co. case relied generally upon principle in unfair competition.

In the latter case the evidence shows that a corporation not a Ford agent held itself out as such, carrying a sign on its place of business to this effect, and advertising itself otherwise to the trade in this way, and it was alleged that by fraud and collusion with company agents it was enabled to present fictitious orders for automobiles and sell same at other than list prices.

In the other case there was advertisement for sale of Ingersoll watches at less than the stipulated price to the public, every watch "new, with usual Ingersoll guaranty."

The New Jersey case resembles more the Dick case than the other does, but it is pointed out that the goods of complainant "are not manufactured under patents. It is constantly in competition with manufacturers of cheap watches. Not only is it morally bound as a result of its advertising to guarantee its product, but it, in fact, guarantees it in writing. The defendant makes use of the name, reputation and guaranty of complainant for its own ulterior purpose and appropriates to itself the effect of the extensive advertising, upon which complainant depends, for defendant's own profit, in violation of the contract expressed in the notice, and with no desire to benefit the public."

We think here is a narrow basis to prevent resale at less than list price endeav-

ored to be forced on every purchaser. If there was no patented article to be sold, so much less had the manufacturer any right to dictate future sales. As far as the guaranty which goes with every sale at the list price, that was something for the benefit of the purchaser. It was a deceit by the seller thus to advertise to increase his sales, and possibly to say that every watch was "new." And we greatly doubt whether there is an appropriation of a trade-mark to call the watch an Ingersoll watch. That name was descriptive of the kind of watch that was being sold. There perhaps was no other adequate way to say what was being offered for sale. The manufacturer had created the description itself.

In the Ford Motor Co. case unfair competition seems more clearly evident. Defendant operated by fraud and collusion to obtain title. It pretended to buy for others, when it only was buying for itself and through agents pretending to have orders of users or proposed users, and not dealers. It was said: "The defendants used plaintiff's trade-mark after the manner of a regular Ford agency. They falsely and with intent to deceive, advertised that they were 'Ford agents' and that they were a 'Ford auto agency,' and for the same purpose they have fraudulently represented to prospective purchasers of Ford cars that they were 'Ford agents.' Admittedly, they resorted to these practices for the purpose of deceiving, and there can be no question that the means employed were well adapted to that purpose."

While there is plain evidence of fraud in the latter case, it may be thought there may be strong inference of fraud in the other. But it is not conclusive. In neither case does there seem any very persuasive evidence of misuse of trade-mark, because the products admittedly were genuine products. If there was fraud and it reasonably might be thought to injure plaintiffs as to fair sales in open market, they ought to be protected. We cannot see, however, that, if plaintiffs had no right to dictate prices on resale, the preventing of this is, as a pure matter of law, *damnum obsque injuria*.

NOTES OF IMPORTANT DECISIONS.

PUBLIC POLICY—AGREEMENT BY PROMISEE TO ABANDON HIS HOME AND REMOVE TO ANOTHER LOCALITY.—Wallace v. McPherson, 197 S. W. 565, decided by Supreme Court of Tennessee, shows a contract whereby the personal comfort of a certain member of a family was sought after by their payment to another member of a monthly sum as long as he should remain away from the city in which the promissors lived. After the consideration was stated, there are provisions to the effect that any return to the residence place of the promissors, or any visits to them, except upon express invitation, or any unsolicited communication by him by letter or otherwise, shall terminate the contract.

Payments having ceased because promisee returned against the protest of promissors, they ceased to make the payments agreed to be made and declared the contract terminated. The promisee brought suit to have the contract declared existent and to collect arrears in payments. The lower courts gave judgment in plaintiff's favor, on the theory of the invalidity of the promise to stay away, and this ruling the Supreme Court reverses.

The court said: "There is no provision or rule of federal or state statute that forbids such a contract or condition, unless condition falls within that department of the common law which relates to contracts against public policy." After stating that public policy, outside of statute, concerns "only such matters as are contrary to the public morals, public safety, the public health, or that can be reasonably held from any point of view as inimical to the public welfare," it speaks of the contract involved as follows: "There is, indeed, no question of the public health or public safety, and, so far as morality is concerned, such an arrangement seems promotive of it. Being promotive of private morals, the safety of individuals comprising a part of the public, it seems to result in a distinct gain to the public welfare."

The court then goes on to speak of plaintiff being only denied residence in a single place, or there to hold office or vote, and his option to resume all these privileges whenever he

chose by relinquishing his rights to further payments.

Of course it is a consideration for the promise, that plaintiff should give up his residence, but what strikes us as singular is, that if there was anything contrary to public policy, this invalidated the promise so greatly as to take away all consideration for its making. But the Tennessee courts may have regarded this as a contract under seal and under their rulings may have regarded a seal as conclusive of the question of consideration. Therefore, we will inquire whether or not in essence the condition was against public policy.

It seems to us it was. The government has an interest in its citizens exercising their free rights to live where they please. An agreement not to live in a particular place is not like an agreement not to do business in a certain locality. That pertains to restraint of trade only —allowable, if not undue. It is not a question of the condition being onerous.

Besides, if one is troublesome to neighbors or relatives at home, he is not to be foisted on another community. Nor is his right to vote to be transferred to another community. The other communities accept residents on a presumption of free choice by them and not by the will of another. Our immigration laws have provisions touching this kind of a question in forbidding entrance into this country of those under contract to serve as laborers a particular company or employer.

INTERNATIONAL LAW — WAIVER OF SOVEREIGNTY PERMITTING INTERVENTION BY THIRD PERSON.—In Kingdom of Roumania v. Guaranty Trust Co., 244 Fed. 195, decided by District Court, Southern District of New York, the question arose, whether by a soverign country bringing suit in the courts of this country this opened way for defendant to ask that a third person be allowed to intervene and assert his interest in a fund in defendant's hands. In the motion for an order interpleading the third person, the latter not only consented to the granting of the order, but urged the granting of the motion of defendant.

It appeared that this third person had instituted a suit against the Kingdom of Roumania and the defendant trust company, in which it claimed the fund for which the kingdom was suing the defendant company.

The court said: "This fund is held by the Guaranty Trust Company of New York as the agent of the Roumanian government. Arditti could not successfully sue the Kingdom of Roumania here. The immunity from suit is a privilege which a government may waive by its voluntary appearance in a court of the United States. However, since it voluntarily becomes a party to a suit involving its interest by the commencement of this action, and thereby waives such immunity by the institution of this action in the federal court of the United States, it cannot complain now that its adversary in that litigation seeks to protect itself by the exercise of its right to interplead another claimant."

Does the waiver arising extend as far as the court ruled it did? The defendant either was seeking its own benefit or a benefit in behalf of a third person. If in defendant's necessary defense, there could be no question that the intervention was rightly ordered. It is stated that defendant was the agent of the Roumanian government and as such agent held a fund which was being sued for. Now, as no third person could interpose his claim between such principal and agent, because the principal was exempt from suit, how may it be said that in a suit between such principal and agent, there was any submission to the court, further than was necessary to determine any controversy between them?

The court said: "Before the Guaranty Trust Company of New York is entitled to interplead Arditti, it must show, first, that two or more persons have preferred a claim against petitioner; second, that claim is made to the same thing; third, that petitioner has no beneficial interest in the same thing; and, fourth, that it cannot determine without hazard to itself, to which of the claimants the moneys belong." It was ruled that there was evidence to show there was real hazard in turning over the money to the Roumanian government.

We think, however, there was no hazard in law for petitioner to turn over the money to its principal, because of the utter inability of the third person to prosecute any claim therefor against the Roumanian government. There seems to have been no waiver except as to trust company making a legitimate defense in a suit by its principal.

DEATH—DAMAGES TO SURVIVING RELATIVES UNDER FEDERAL EMPLOYERS' LIABILITY ACT.—It has been held by federal Supreme Court that when the relation between a deceased, whose death as an employe in interstate commerce, gave a right of action to surviving relatives, is shown, there is a presumption of pecuniary loss, yet the presumption is

rebuttable. Minneapolis, etc., R. Co. v. Gotschall, 244 U. S. 66.

In a recent case in the Supreme Court of South Carolina, the question arose whether a widow of such deceased, who after his abandonment of her and her living with another man for some 16 or 18 years, by whom she had another child, her husband contributing in no way to her support, was entitled to any recovery for his death. Gilliam v. Sou. Ry. Co., 93 S. E. 865.

The South Carolina court, speaking of right of recovery, said: "Although the technical right (to recover) may exist, yet the deprivation of it may cause very little, or, possibly, no actual financial loss, for it may be shown from the relation, circumstances and relative condition of deceased and the surviving relatives for whose benefit the action is brought, that no actual pecuniary loss, present or prospective, resulted to them from his death, and it is well settled that it is only for such loss that recovery may be had, or it may appear that some of them sustained such loss, while others did not."

The court, therefore, thought that the court should have instructed the jury, that in view of evidence tending to show forfeiture by the wife of her right to support, as to apportionment between surviving relatives for actual pecuniary loss to each of them, this should have been called to their attention.

Instead of giving this instruction, the trial court instructed that "the law of this state imposes upon a man the duty of supporting his wife and children, and in the absence of other proof, it will be presumed that everybody obeys the law of the land until the contrary appears."

The court while approving the instruction as sound in the abstract, yet in view of the evidence, considered it misleading. "Under the evidence, recovery, if at all, should have been limited to the prospective loss which the widow and daughter actually sustained by reason of the deprivation of their right of support as heretofore explained."

Whatever may be said as to forfeiture by wife, we think there was no evidence for a jury to consider which would militate against the minor daughter being in the situation of the parents having lived together in complete harmony. It was not her fault that the situation was otherwise. Also, as to the wife, the original fault in the husband's abandonment, if this was without excuse, should have been taken into consideration. Merely what the husband would be likely to do as to either wife or daughter, had he not have lost his life, is not a conclusive test as to this. What he ought to do is a better rule. And this militates in no way against the railroad, or, at least, as against its essential rights. It was a tortfeasor and could take advantage of no peculiar circumstances mitigating damages for its default. It would seem, therefore, that the instruction given by the trial court was quite nearly correct.

JUDICIAL OPINIONS IN AMERICAN COURTS — OBSCURING PRECEDENT AND INCREASING CONFUSION.

Introductory.—By way of preparation for this article I have consulted Volume 1A, American Digest, covering April 1, 1916, to August 31, 1916, and containing syllabi, reportorial and "by the court" of decisions for that period. This volume has 2173 pages of these syllabi and 129 pages of "Table of Cases Digested." The cases approximate 25,000 in number. At the same ratio there would be five thousand per month or sixty thousand for the year, each jurisdiction averaging more than 1,200. What the result is in pages of reports of opinions and the number of those reports, let each of my readers guess for himself. The output necessarily must be vast.

The Reporter System has sought by a "key number" plan to standardize search into this perennially growing mass. This suggests standardization of a conglomeration. Is there such infinite variety in new grist for judicial miles in a well-ordered government as to be insusceptible of standardization? Or is it that processes regarding old grist have been so inaccurately indicated that they must be restated? Or have the narrators regarding new grist forgotten elements in the old grist or did they never know them? Do they act as if they were now making discoveries?

Procedural Rules.—In adjective, as distinguished from substantive law, controversy as to construction ought soon to die of inanition. If a rule of procedure framed

by courts or law-making bodies cannot become settled in a reasonable time, it must be because it is itself so abnormal as to look like special legislation and, therefore, only occasionally considered. Such is unworthy to be called a rule It is itself an exception

In the bulky "American Digest" above referred to, it is seen that adjective law under the title "Appeal and Error" "leads all the rest," and, if my point has force, not as creditably as did the name Abou Ben Adhem. It has 159 pages of fine print to its score, and prior American Digests show this was to be expected. Substantive law in a title like "Contracts" is found within the compass of 27 pages, "Covenants" in 5 pages, "Equity" in 11 pages, "Easements" in 6 pages, "Guaranty" in 4 pages, "Sales" in 9 pages and other important subjects in like proportion.

It no doubt is true, also, that many problems disposed of in questions of substantive law call for statutory construction, but it is not true that there may be, except as a rarity, any question under "Appeal and Error" not referable to statute. Nor is it true, generally speaking, that rules governing the taking of cases from a lower to a higher court, are of recent origin in any state or in the United States. Yet, under this title, we go on threshing old straw and grinding old grain, and most laboriously, too.

Let us, almost at random, take one of the subheads in the subject "Appeal and Error." Thus under "Failure to Urge Objections" there appear rulings from 14 states, embracing 17 courts, with duplication of cases as to some of the courts. Taking the first state court in the order of the alphabet, we find six cases from Alabama, two in its Supreme Court and four in its Court of Appeals. In one of these cases a great number of Alabama rulings are cited. From Indiana there are nine rulings in eight cases. This for five months of court does pretty well.

Looking at this subhead in the Decennial Edition of the American Digest and it easily is to be estimated that not less than 1,000 cases are cited to the proposition that "Errors not discussed on appeals, either in the brief or oral argument of appellant's counsel, will be deemed waived," and not a single case to the contrary. One is apt to wonder why so frequent mention is made of a contention that never came before an appellate court. Why cumber its own record? It is surely a dull bar which so insistently must be told, why a court will pay no attention to irrelevant questions. To quietly ignore, or, possibly, strike out from assignments of error and briefs such contentions or stop counsel in oral argument advocating them, would get everybody further along. This not only would save a suffering court, but also, a suffering public. One of the cases[1] digested in Volume 1A, *supra,* cites much Alabama authority to show the court should not entertain a question of this kind.

But take a question which a court must consider where error complained of has been committed or invited by a complaining party. In Decennial Digest about every court in the country is cited, each court in numerous rulings, in support of enforcement of estoppel. One ruling is contra,[2] and later cases from that state are opposed to it.

In Volume 1A, *supra,* cases from possibly one-half of the states are cited in support and not one to the contrary. A subhead shows this principle applied as to nature and theory of cause as it was tried in the court appealed from.[3] The Decennial Edition shows 11 states affirming the principle and the Century Edition 13, with no ruling to the contrary.

(1) Wayne County v. Waynesboro, Ala. 72 So. 158.

(2) Adams v. Clark, 63 Mass. (9 Cush.) 215, 57 Am. Dec. 41.

(3) Buck v. Rosenthal, 273 Ill. 184, 112 N. E. 671; City of Rainier v. Masters, 79 Ore. 534, 155 Pac. 1197; Teel v. Brown, Tex. Civ. App. 185 S. W. 319.

Discussion where Harmless Error is Committed.—Possibly the greatest number of cases of the 1,247 sections under Appeal and Error, besides subsections, occurs as to Harmless Error. Why should courts waste time and energy in writing opinions in these cases? And yet they frequently go into great elaboration of writing on various questions raised, and then affirm for "harmless error." Announcement of such ruling ordinarily occurs in affirmed cases.

Take a late case by Third Circuit Court of Appeals,[4] where much consideration is given to questions raised and ruled adversely to plaintiff in error. The court concludes its opinion by saying: "Assuming, for present purposes, that the court did err in submitting the materiality of these questions to the jury, a matter, however, upon which we express no opinion, a study of the proof shows that no substantial wrong was done the defendant thereby as to warrant a reversal of this judgment on that ground, for the character of proof submitted is such that a court would not have been justified in sustaining a verdict adverse to the policy." Why, then, would it not have been better for the court in review of alleged error to go the other way round and inquire whether a case has been properly submitted and if it has not been, error is prejudicial. If it has been, let the case be affirmed, and all other questions be deemed immaterial. This observation appears to me particularly applicable to Federal courts in deciding causes dependent on State law.

In another case[5] by Second Circuit Court of Appeals a state statute was applied and it was affirmed, the Court saying as to assignments of error that, if rulings "were errors, and we do not decide that they were, they were not prejudicial." Why not let the whole matter go at that? But the court did not do this. Why, indeed, is not the following syllabus by a court a good rule: "Under the evidence and the defendant's statement, the verdict rendered was demanded, and it is therefore unnecessary to consider the alleged errors of commission and omission in the charge of the court?"[6] Yet in an opinion by Arkansas Supreme Court,[7] where it was said that as appellee was entitled to a directed verdict no prejudice could have resulted from instructions even if incorrect, the Court writes abundantly, and cites much authority in support of rulings on other points. If one really has no meritorious controversy in an appellate court from a court that ought to have directed a verdict in the way it was rendered, under settled law, why go into any discussion whatever? Why is not an appellate court subject to the same rule as a trial court, namely that a decision may be right though erroneous reasons be stated therefor?

Affirmance of Judgments, but Not of Reasons Therefor.—No litigant has any right but to have his case properly decided. Thus it was said in a Pennsylvania case:[8] "Whether the court below correctly concluded that Com. v. Messinger was conclusive that plaintiff could not recover on the bond given by the appellee, we need not decide, for the judgment for the defendant *non obstante veredicto* was manifestly proper for a reason about to be given. While in equity proceedings the reasons and opinion of the chancellor are always open to discover the grounds of his action, the review of a judgment in a common law action is confined to it without reference to the reasons of the Court for entering it. If a judgment be right, even though reasons given wholly fail to sustain it, or would logically lead to a different one, it must stand." And suppose that though the Supreme Court may have sustained this judgment for a less sufficient reason than the

(4) Am. Temperance L. Ins. Association v. Solomon, 233 Fed. 213, 147 C. C. A. 219.
(5) Continental Public Works Co. v. Stein, 232 Fed. 559, 146 C. C. A. 517.
(6) Hall v. State, 17 Ga. App. 806, 88 S. E. 592.
(7) Bolen v. Still, 123 Ark. 308, 185 S. W. 811.
(8) Commonwealth v. Wing, 253 Pa. 226, 97 Atl. 1072.

lower court gave for rendering it or one logically leading to its reversal, no subsequent ruling is bound to adopt it, rather than the lower court's reasoning.

In Washington[9] Supreme Court it was held that a decision by a trial court "correct upon any theory will be sustained in the appellate court, although the theory of the trial court may have been erroneous." Why, therefore, are reasons of an appellate court of importance, if upon any theory its judgment is right? Is that judgment any less a precedent if a wrong reason is given for its rendition? Why, then, should reasons afterwards be stated by an opinion writer in an appellate, any more than by an opinion writer in a trial, court? It is not the philosophy of the law we are to look for in opinions. It is for others to discern that for themselves, distinguishing precedents according to facts underlying their application. If reasoning is indulged in by judges, supposably this is to satisfy their own minds. It surely can find no others. It, therefore, needs to be sparsely set forth.

Participants in Decision not Necessarily in Reasons.—The fact that the majority in an appellate court must concur in a ruling to make it that of a court does not require all to unite in processes of mind thereto. This fact ought greatly to eliminate argumentative parts of an opinion. But is it so, that there is this effect? In Georgia practice it is required that: "No decision shall be delivered *ore tenus;* but the same shall be announced by a written synopsis of the points decided. * * * And no decision shall be published in the reports until the said decision shall have been revised by each of the judges presiding in the case."[10] It would make no difference how many judges constituted a court in this kind of an arrangement, except that numbers, instead of multiplying words in decision, would pare away redundancy. It is the collective mind that speaks and what is announced excludes individual views in argumentation, as to which any member might prefer to reserve his view until its expression comes necessarily into the decision of a case.

Take a court in which opinions are to be delivered, and, at the start, it would seem this ought to mean not an expression of individual views of members of a court, but decisions upon questions involved. The reasons why a judge or a majority of the judges come to a particular decision may logically conduce thereto or they may be thought not so to do. But the decision is not strengthened or impaired by the reasoning. It may, however, tend to confusion in application of what has been decided.

Take for example two judges agreeing upon a legal proposition. One may accept it, because he construes the proof to show what the other may think has been disproved. One judge may attach special importance to one fact in evidence, while another may deem this unimportant and find basis for his agreement in another circumstance. If the two set forth their differing views to the same conclusion, is precedent helped or harmed?

To illustrate how greatly hurtful this may be a Missouri case seems in point.[11] In this case, in a court of seven members, three concurred generally, one specially and three dissented. Four judges appear to have concurred on the main point and three dissented and, as I read the three opinions handed down, three only concurred in the result, while four dissented therefrom. But the decision of the three concurring in the result ordered the case remanded to carry out that result. Whatever force a part of this decision may have as a precedent, the full disposition of the case is clouded.

As it involves much search to find illustrative cases in different jurisdictions I con-

(9) Shafer v. United States Casualty Co., 90 Wash. 687, 156 Pac. 861.

(10) Code of Georgia, 1911, § 6202.

(11) Lusk v. Atkinson, 268 Mo. 109, 186 S. W. 703.

tent myself with adhering to Missouri decision to show the evils of opinion writing by judges going into lengthy discussions of points, where views are not approved by a majority of the court. In Kohnle v. Kohnle,[12] one judge wrote an opinion containing three paragraphs. The case was in divisions and not in banc. The two other judges, constituting a majority in division concurred in paragraphs two and three, but expressed no opinion as to paragraph one. But, as I read the case, to express a dissenting view to paragraph one would have made wholly unnecessary the handing down of any views such as were expressed in the other two paragraphs. The first paragraph held there was survival after death of the cause of action. Furthermore that paragraph expressed disapproval of a contrary holding by an intermediate court of appeals of the state. By Missouri Constitution it is made the duty of the Supreme Court to keep subordinate appellate tribunals in harmony with each other and with the Supreme Court's view of the law. To make this worse the case was not in banc, but in division. Another case in this state[13] involved two principal questions, viz: whether a child had been legally adopted and whether there had been an election under a will. To show adoption was necessary to give a *locus standi* to the child. The writer of the opinion held there was adoption, and that there was an election. He went into a very elaborate discussion of the adoption proposition, citing authority from his own and other states. He dwelled much more largely on this than on the question of election. His two associates said, however, that they concurred only as to the paragraph in regard to the latter and expressed no opinion as to the other. Ought the part of the opinion relating to adoption to go out to the world as a ruling when it had never been agreed to by a majority, and when, as plaintiff had concluded himself against attacking the will by election, this put adoption *vel non* out of the case? This also was a case in division and not in banc.

In another case[13] in this Court of seven, the following appears: "Woodson, Farris and Revelle, J. J., concur in paragraph two and in result; Bond, J., concurs in paragraph one and result, Walker and Blair, J. J., dissent." To what do they dissent or with what of the opinion do they agree, if any part? While paragraphs two and three have a majority in their favor, paragraph one has only two members in its support, or seems to have. Why allow it to masquerade as deciding anything? Why not have one of the four concurring in paragraph 2 base the ruling on that alone? The writer of the opinion says it was upon this paragraph that the majority agree. Who wishes any views as to anything in which a majority do not agree?

No doubt many opinions may be found in other states inviting or tolerating a kind of free lance writing by judges, such as is followed in many Missouri cases by the noncomittal statement: "I concur in the result." What do these amount to as rulings on principle? Logically ought not the facts to be set out, and the statement made either that the cause is affirmed or reversed, as the case may be? A learned bar were better left to work out the applicable principle for itself, than be disturbed by views of one writer, either accepted or not accepted, by the record as to which no one may ever know.

Discursiveness in Opinion Writing. — There seem to be faults in opinion writing both in laborious argumentation and in multiplying citation of cases in support of propositions announced. If the former is indulged in, it is more than apt to confuse, because it may be an elaboration in which the characteristics of the writer play too much a part. And it may be broader than the particular issue involved justifies. Con-

(12) 268 Mo. 463, 188 S. W. 155.
(13) Lindsley v. Patterson, Mo. 177 S. W. 826.
(14) State ex rel v. Roach, 269 Mo. 500, S. W.

versely, it may show too strict a narrowing in regard to underlying principles. But above all it may invest the subject treated with doubt, because strictly lawyerlike expression is not used. How frequently have all of us heard discussion over doubts as to what was in the mind of a court in the case of language in an opinion? And suggestion, too, that a turn in expression was *arguendo* by the writer and not necessarily in the concurrence given by other judges. The suggestion may be attempted to be fortified by language used by concurring judges in other opinions. In this way the real meaning of a decision is sought for in other argumentative opinions as little representative of the real views of the courts as a whole, as the opinion under consideration. In this, doubt is not cleared, but language deepens obscurity.

As to citations of cases in support of propositions, this may be misleading, because of their very multitude. The rulings may depend on such diversity of facts, that generalization is not logically possible. The only absolutely pertinent case to be cited in support of a proposition is one where the essential facts are the same. How important, then, is it that mere lumber is not drawn in this way? And, furthermore, if the proposition is really supported firmly by a great abundance of recognized authority, why should a judge, writing an opinion, do any more than state the proposition? This practice is followed in *per curiam* opinions by our highest court and it assumes the governing principle has become settled law. If it is settled, why take a risk in reasoning about it? If all prior doctors in the law, have not stated the matter clearly, who knows that a present writer can or does? If the same language is used, the present judge gets us nowhere. If he employs different speech, he presents occasion for controversy.

Judicial Pride in Opinion Writing.—I have heard it said, that the *obiter* reasoning in Chief Justice Marshall's opinions has done as much to help towards the true exposition of our Constitution as that the cases in which it was employed themselves do. This no one can more than surmise. The fact that this reasoning was later embodied in ruling may be the case of *post hoc,* rather than *propter hoc.* Or his great genius may have blazed the way. Who can tell? At all events, this country at that time was in its constructive era? It was studying a chart that was new to the world. We were trying to find our bearings. The people were in unrest. The Constitution's efficacy, as well as its purport, was challenged. Exposition needed to proceed along lines of reasoning. Our great court was looked to as a prototype, not in declaration, but in the *rationale* of declaration.

That is, generally speaking, not the situation to-day. We know where we stand as to all elemental rights. Our courts have now more the duty to apply known law. If there is new law and the old needs to be referred to for its interpretation, the task is to give precedents, not by new reasoning, but by an accepted reasoning, which has commended them to us.

This is especially true as to state courts which have jurisdiction as to rights and remedies between individuals. If we know our common law well we are apt, if we have to, to rely on it without elaboration of its precepts. If we do not know it, we flounder about in our reasoning. Acuteness, and not acumen, is our aid. The former is individual; the latter is from training. As variant as predisposition is one; as uniform as may be precedent, the other. But the habit of lengthy disquisition in Marshall's day has been looked to as a precedent, without inqury whether it fits into our jurisprudence now. This general remark our judges may admit is sound, but each of them may think he is outside of its application. He must elaborate, because he

needs to be heard from. If his preparation is along a new line to him, to others what he has learned must be unfolded. He will appear learned by much speech. And as to it he has not learned conciseness in statement. Alas, how little the training of a stenographer helps in this way! The judge may lose himself in the fervor of an oration. At least he cannot keep track so easily of what has gone before.

The real reason, we think, is that the duties of appellate tribunals are so multitudinous, they have not time to condense as they should. It is easier to talk about a proposition that is submitted than it is to determine it cuts no figure in a case. And to use a multitude of words is the recourse without due reflection, and unimportant speech by a court is a snare in the future for previously accepted precedent. When lawyers read it, it has become cryptic. They search for its justification in precedent, and finding none, they turn to see if it really was necessary to be said at all. But even then, their doubts are not solved. Whom does the statement bind? And how long may it stand as a breakwater, if nothing else, in the stream of decision? Under the doctrine of *stare decisis* it may have a greatly longer lease of life, than it should have.

Above all, however, if judges, who may not deem themselves greatly inferior to Marshall as an expounder, wish to write opinions, the occasion is more than apt to present itself as an urgent call therefor. It may be a curb on their inspiration or on their exuberance of language, if they confine themselves strictly to discussion of things, in which their associates are in full agreement. This not only will conduce to brevity but to clarity as well.

N. C. COLLIER.

St. Louis, Mo.

BREACH OF MARRIAGE PROMISE—DAMAGES.

O'BRIEN v. MANNING.

Supreme Court, Trial Term, Queens County. August 11, 1917.

166 N. Y. S. 760

In an action for breach of marriage promise, where plaintiff was 29 years of age, and defendant, who was worth $15,000,000, was 84, and the only elements of damage were mortification, wounded pride and loss of benefits, a verdict for $225,000 damages is excessive, and will be reduced to $125,000.

CROPSEY, J. The only question arising on the motion to set aside the verdict is whether it is excessive. The jury awarded the plaintiff $225,000 damages. They divided this sum, and stated that $25,000 of it was as exemplary or punitive damages and $200,000 as compensatory damages.

In actions for breach of promise of marriage the amount of the damages is peculiarly one for a jury's determination. While the rule of law which defines the elements of damage is clear, the opinions as to the amount of such damages will vary greatly. So appellate courts seldom interfere with the amount of the verdict in such an action. And the trial courts do not interfere either if there is any reasonable basis upon which the verdict could have been found, and there is no reason to believe the jury was swayed by sympathy or prejudice or passion.

The defendant is very rich, but very old, and these and other facts put this case in a class by itself, and no other case to which attention has been called is an aid in determining this motion. This case, fortunately, is free of the harrowing circumstances that not infrequently are present in actions of this character, and which naturally and properly increase the damages. It also lacks a number of elements of damage which are usually present. Here the plaintiff admitted she did not love the defendant, and so there was no wounding of the affections. She is 29 years of age, and the defendant is 84, and while he maintains considerable vigor, he is partially palsied. There was no period of courtship or engagement. The offer and promise were to be followed in a few days by the ceremony, and in that short interval the breach occurred. The plaintiff sustained no loss of social position, no loss of a chance to marry someone else, and she incurred practically no expense in preparation. Her only

elements of damage were her mortification and wounded pride and the loss of benefits she would have had. Necessarily the loss of benefits is the principal factor in her damages. As said in Wolters v. Schultz, 1 Misc. Rep. 196, at 199, 200, 21 N. Y. Supp. 768, 770:

"If a plaintiff enters into a marriage engagement from mercenary motives only, she may still recover, if she intended and was willing to carry out the agreement; but in such event the damage should not exceed the actual pecuniary loss or outlay, since disappointed love of defendant's money furnishes no ground of legal redress, and she could not justly complain that defendant's conception of the contract, or his standard of duty, was not higher than her own."

What "pecuniary loss" has the plaintiff here suffered? That is measured in part by the defendant's means, but other elements enter into it. The age of the defendant, his health and probability of life, his manner of living, his social status, his generosity, or his niggardliness—these are also to be considered. Bennett v. Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442. While there is no direct proof of defendant's means, his reputed wealth is from $15,000,000 to $20,000,000, and as he took the witness stand in his own behalf and did not say how much he was worth and did not deny that he was as rich as he was reputed to be, it can safely be assumed the reputed figures do not overstate the size of his fortune. Chellis v. Chapman, 125 N. Y. 214, 221, 26 N. E. 308, 11 L. R. A. 784. The evidence shows that the defendant lived very simply; that he was most frugal and economical, even parsimonious, and did not live on any scale commensurate with his great wealth. Nor did he hold any prominent social position, such as is not infrequently acquired by persons who are the possessors of large fortunes.

The conditions under which the plaintiff would have lived had she married the defendant are plainly set forth in the proof. It is manifest that the great wealth of the defendant would not have been of corresponding benefit to the plaintiff. The worldly advantage she would have obtained by becoming his wife would probably have been no greater than if he was worth only $1,000,000. A possible inheritance or gift by will cannot be considered as an element of damage. An inchoate right of dower might be so considered, for that is determined upon marriage and cannot be taken away, but there is no proof here upon which to make an award for such a loss. Beyond a certain figure, additional wealth does not furnish the basis for increased damages in such cases. Then, too, the age and probability of life of the defendant must be considered. The plaintiff's loss of benefits would be measured in length of time by the life of the defendant. Under the mortality tables his probability of life is limited to a few years. Under these conditions the sum awarded for compensatory damages, namely, $200,000 seems grossly excessive. By no reasonable possibility on the evidence in the case could the plaintiff have suffered in "pecuniary loss" to such an extent.

Evidence was introduced on the trial which naturally aroused a feeling against the defendant. There was no objection made to its admission and so no error arises, but it is not unlikely that it accounts for the size of the verdict. And now the reference is not to the matters set up in the answer. It is to the proof that the defendant strangled his daughter's pet dog, for no reason apparently except he did not approve of dogs, and that he was expelled from the Stock Exchange for altering some certificates, and that he had been sued by his former wife for a separation, on charges of cruelty and nonsupport. These matters necessarily prejudiced the jury against the defendant, even though it was done unconsciously, and they must account for the result.

The jury were instructed under what circumstances they could award exemplary damages, and they were fully justified in so doing. The charges against the plaintiff made by the defendant in his answer were untrue, and were known by him to be untrue at the time, as he admitted on the stand they were put in the answer "to protect" himself against the claim made by the plaintiff. Such a step was unjustified; it was even inexcusable. It was vicious, and showed an utter disregard of the plaintiff's rights and feelings. It merited punishment, and so an award of exemplary damages.

The verdict must be reduced to $125,000, or, if the plaintiff does not accept such reduction within 10 days after the service of a copy of the order to be entered hereon, a new trial must be granted.

Execution of the judgment will be stayed for 30 days after notice of its entry.

NOTE.—*Aggravation of Damages in Breach of Promise Case by Charges in Defendant's Answer.*—The instant case holds, that exemplary damages were recoverable, because of an untrue charge against plaintiff put there "to protect" defendant against plaintiff's claim. The court said this "merited punishment and so an award of exemplary damages."

In Hively v. Golnick, 123 Minn. 498, 144 N. W. 213, 49 L. R. A. (N. S.) 757, it was ruled,

that no damages whether by way of aggravation or as exemplary are recoverable in the suit as brought. The court said: "The wrong in setting up and attempting to establish a defense known to be false, or without reason for believing it to be true, is entirely separate from the breach of promise. Such a cause of action would be in the nature of a libel. Occurring as it must, after the action for the breach is commenced, and there being no pleadings to form an issue, it would seem clear that any recovery for the wrong must be in another action."

But it has been held that an attempt, without success, to blacken the character of plaintiff by charging unchaste conduct aggravates the damages. Broyhill v. Norton, 175 Mo. 190, 74 S. W. 1024. There was not even in this case anything in the answer attacking plaintiff's character, but the court said defendant's "speech in testifying was flippant in style and abounded in indecent insinuations. His innuendo that he was criminally intimate with the plaintiff was altogether voluntary. * * * He has therefore no one but himself to blame for this large amount of damages against him. He made the jury believe that he had blighted the life of this young woman and they seem to have concluded that he ought to compensate her for the injury as far as money could do so." The verdict on this theory was sustained.

In Kniffen v. McConnell, 30 N. Y. 285, defendant's attempt to prove plaintiff guilty of misconduct, when he knew she was innocent, it was ruled could be considered in estimating damages.

Simpson v. Block, 27 Wis. 206, appears to have proceeded on somewhat similar lines as Hively v. Golnick, *supra*, because it said an unsuccessful attempt to justify his breach by charging that while plaintiff was engaged to him she became engaged to another man. But this case was distinguished from those giving aggravated damages where there was an attempt to prove lascivious conduct by plaintiff, of which he knew she was not guilty.

In Ferguson v. Moore, 98 Tenn. 342, 39 S. W. 341, an imputation against virtue or chastity, if wantonly made, was held properly considered in aggravation of damages.

And English cases have held along the same line. Berry v. Da Costa, 1 Harr. & R. 291, 35 L. J. C. P. N. S. 191.

In Osmun v. Winters, 30 Or. 177, 46 Pac. 780, it was held that a newspaper article published over defendant's name, after the institution of the suit, in which he assailed plaintiff's character, and an insulting letter written by him to her, could be taken into consideration by the jury in assessing damages.

And so there is direct authority for the instant case in the Court of Appeals of New York in Pearce v. State, 207 N. Y. 506, 514, 101 N. E. 434.

The following cases sustain the proposition that if defendant maliciously, wantonly or recklessly alleges as a defense plaintiff's want of chastity and fails to prove it, this as a fact may be considered as aggravation of damages. Fleetford v. Barnett, 11 Colo. App. 77, 52 Pac. 293; Reed v. Clark, 47 Cal. 194; Blackburn v. Mann, 85 Ill. 222; Hayward v. Saucer, 84 Ind. 3; White v. Thomas, 12 O. St. 312, 80 Am. Dec. 347; Leavitt v. Cutler, 37 Wis. 46.

It seems, therefore, that the instant case is right on the weight of authority, and that there is some authority to sustain the proposition that *post litem* charges or conduct may also be taken into consideration by the jury. C.

CORRESPONDENCE

AUTHORITY FOR THE QUOTATION, "THIS IS A GOVERNMENT OF LAWS AND NOT OF MEN."

Dear Mr. Editor:

In your issue of August 24, 1917,* you asked for information as to the author of the expression "This is a government of law and not of men." In the succeeding issue of August 31, 1917, a correspondent submits a citation to Marbury v. Madison. You can also find the phrase in the Declaration of Rights of the Massachusetts Constitution of 1780, in James Harrington's The Art of Lawgiving, Preface; Oceana and Other Works, 3d Edition, 386, in Yick Wo v. Hopkins, 118 U. S. 356, opinion by Justice Miller, and in Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, opinion by Justice Brewer. Marshall, Miller, Brewer, and others should indeed be honored for giving us this basic principle of democratic government.

GEORGE A. MALCOLM,
Associate Justice, Supreme Court of the Philippine Islands.

*Other replies to this inquiry appeared in 85 Cent. Law J. 159, 197, 217, 270.

BOOK REVIEW.

AMERICAN DIGEST, VOLS. 1A and 2A.

We do not know whether a sort of uncanny feeling overtook the great law book house of West Publishing Company or not, but we find that it retreated from calling the annual next succeeding Vol. 22 of American Digest and calls it now the primal number—its letter series, designating it 1A. We do not see, however, that American Digest, Vol. 13, had any tendency to put the house on the "blink." It continued to do "business as usual." It is said

in "Vol. 2A" that it is "continuing the Century Digest, and the First and Second Decennial Digests," which, as we take it, means that Second Decennial Digest now in course of issue embraces everything in American Digests, Nos. 1 to 22 inclusive. One thing, however, we venture to think, and that is that if there is anything discoverable which will still further simplify the running down of any court ruling from 1658 down, the "Key Number" with possible improvement, will nail it to the mast. Our rhetoric here is slightly mixed, but not so the "Key Number."

Every time we take up an advance sheet, or consult a monthly or larger digest, we try to appreciate the vast work that is being done to present decision promptly and put it in its cubby-hole with brand and mark for dragging into view of courts and lawyers, as occasion requires. No court may hide under a bushel anything good or bad it may say, if we want to get hold of it. The "Key Number" goes after it like a ferret with an instinctive sort of scent, or it carries personality of a searcher into the magnetized desire of the hunt.

We thus write more in reflection than as saying anything new about the Reporter System. If the house would give us some dope we might do better. It is its fault, that it has perfected, or apparently perfected, its system, and made it sink into the professional consciousness of lawyers, and thereby covered the ground of discovery and consolidated positions against counter-attack. The volumes, American Digest 1A and 2A, are of the size volume that has prevailed lo these many years and together cover the period from April 1st, 1916, to February 28, 1917, a digest of all current decisions of all the American courts, as during that time they have been reported in the National Reporter System, hailing, as heretofore, from the house of West Publishing Co., St. Paul, Minn.

BOOKS RECEIVED.

Roman Law in the Modern World. By Charles Phineas Sherman, D. C. L. (Yale). Assistant Professor of Roman Law in Yale University, Member of the Bar of Connecticut, of Massachusetts, and of the United States Supreme Court; Curator of the Yale Wheeler Library of Roman, Continental European, and Latin-American Law. In three volumes. Boston. The Boston Book Company. 1917. Price, $13.00. Review will follow.

HUMOR OF THE LAW.

Perhaps the most graceful of all of Mr. Joseph H. Choate's impromptu comments on the other sex was made in one of the "confession books" popular among the society girls of a generation ago. In reply to the question, "If not yourself, who would you be?" he wrote, "Mrs. Choate's second husband."

Country Justice: Ten and costs for reckless driving.

Young Motorist: Listen, judge! We were on our way to your office to have you marry us.

Justice: Twenty and costs, then. You're a darned sight more reckless than I thought you were.—Judge.

In a Kentucky town on the edge of the mountains, the crowd at the post-office was discussing the latest homicide. Uncle Luther Williams, ripe in years and experience, approached the group, and someone turned to him.

"Uncle Luther, how do you stand in regard to this killing yesterday? Don't you think something ought to be done about it?"

"My son," said Uncle Luther, "I'm plumb hostile to all killin's whatsoever. But if 'Bad Bud' Menifee had to kill somebody, it seems to me like he was powerful discreet in the choice he made yistiddy."—Saturday Evening Post.

Police Lieutenant Hanlin was reading a report at his desk when he was disturbed by a commotion at the door. Looking in that direction, he saw a big negro being pushed in through the door by Officer Murphy. The negro's head was bleeding.

"Well, what have you been up to?" said the lieutenant, severely.

"Ah ain' done nothin'," replied the negro.

"You must have done something or you wouldn't be in that state, and you wouldn't have been run in."

"Hones' to Gawd, boss, Ah ain' done nary thing. Naw, suh."

"Well, you must have said something, then."

"Ah ain' say nothin' and Ah ain' done nothin'. Ah was just walking 'long singing, 'Ireland must be heaven, for my mother came from there,' when 'long come somethin' and hit me side de haid. When I wake up this here officer had done got me."—New York Evening Post.

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co. St. Paul, Minn

1. **Accord and Satisfaction**—Evidence.—Code 1904, § 2858, relating to part performance, held to have no application to sale by heirs of interests in estate, so that, option of certain heirs to purchase land not being exercised, they could require sale.—Robinett v. Taylor, Va., 93 S. E. 616.

2. **Agriculture**—Contract. — Courts are required to so interpret an instrument in the form of an agriculture lien or mortgage as to effectuate the intent of the parties as expressed therein.—Jones-Phillips Co. v. McCormick, N. C., 93 S. E. 449.

3. **Appeal and Error**—Interlocutory Owner.—Order allowing new party defendant to be brought in, held not appealable.—Mack Mfg. Co. v. Massachusetts Bonding & Ins. Co., S. C., 93 S. E. 713.

4.——Pendency of Case.—On appeal to the Supreme Court the case remains alive in the superior court until the case is certified back and final judgment entered in accordance with the certificate, and the superior court may entertain motion for a new trial for newly discovered evidence at the next term prior to such final judgment.—Allen v. Gooding, N. C., 93. S. E. 740.

5. **Arbitration and Award**—Decision by Majority.—Under submission to arbitration, not expressly or impliedly authorizing majority of arbitrators to act, award held void where only two of the three arbitrators participated in the consideration and decision; Code 1904, § 5, subsec. 3, having no application.—Fraley v. Nickels, Va., 93 S. E. 636.

6.——Jurisdiction.—In an action for money loaned, where the parties agreed and did submit for arbitration stipulating for judgment entry according to the result of the arbitration, the court had jurisdiction to entertain a motion to set aside the award upon allegations that the arbitration was fraudulent and wrongful.—Nelson v. Reinhart, Nev., 167 Pac. 690.

7. **Attorney and Client**—Agency.—An attorney has no right to compromise his client's case without special authority.—Chavis v. Brown, N. C., 93 S. E. 471.

8. **Bailment**—Reversionary Interest.—Where permanent injury is done to a chattel which will depreciate when it is returned by bailee, bailor may recover for injury to his reversionary interest, whether bailment has expired or not and regardless of whether bailee might recover for injury to his possession.—McLaughlin v. Norfolk Southern R. Co., N. C., 93 S. E. 748.

9. **Bankruptcy**—Intervention. — Trustee in bankruptcy permitted to intervene, held to become a party for all purposes and to carry with him his character as trustee, though not appointed until after commencement of suit.—Rennells v. Potter, Mich., 164 N. W. 475.

10.——Reorganization.—Where court found that F company was the D company under a new name, decree authorizing D company's trustee in bankruptcy to take possession of property and administer it, held not erroneous because not providing for payment of the debts and obligations of the F company and the claims of its pretended proprietor.—Rennells v. Potter, Mich., 164 N. W. 475.

11. **Banks and Banking**—Checks.—Payment of proceeds of check by defendant bank to its customer, in good faith and without notice of any defect in title to check, held a complete defense to payee's action on implied contract for money had and received.—A. D. Adair & McCarty Bros. v. Central Bank & Trust Corp., Ga., 93 S. E. 542.

12.——Ratification. — Where a bank's directors, consisting of all its stockholders, ratify an act of an officer in paying to himself an allowance as salary and expenses, the ratification, though informal, is binding.—Security State Bank of Strasburg v. Fischer, N. D., 164 N. W. 326.

13. **Bills and Notes**—Failure of Consideration.—Maker of note assuring bank that it was "all right," and requesting it to make loan to payee after bank had made loan, and take note as collateral, could not say that consideration therefor had failed, or that bank knew that it might fail on third person's non-performance of executory contract.—Norment v. First Nat. Bank, N. M., 167 Pac. 731.

14.——Forbearance.—Forbearance of payee to make claim against husband's estate was sufficient consideration to support wife's renewal note.—Mohn v. Mohn, Ia., 164 N. W. 341.

15. **Boundaries**—Arbitration and Award. — Under submission requiring arbitrators to hear evidence, award held not to fail to conform to

the submission, because locating boundary according to agreement of the parties.—Fraley v. Nickels, Va., 93 S. E. 636.

16. **Brokers**—Producing Customer. — "Able," within the rule that to be entitled to commissions the broker must produce a customer able, etc., means that he must have the money at the time for the cash payment, and not merely property on which he could raise it.—Reynor v. Mackrill, Ia., 164 N. W. 335.

17. **Cancellation of Instruments**—Evidence.—Plaintiffs in a bill to have deeds declared void and for a reconveyance to them as the grantor's heirs were entitled to such relief, where the evidence did not show a delivery of the deeds to the grantees in grantor's lifetime.—Harroun v. Graham, Pa., 101 Atl. 985.

18. **Carriers of Goods**—Bill of Lading.—An interstate carrier is liable in the same measure for damage to shipment, though it failed to issue bill of lading prescribed by federal law.—Bryan v. Louisville & N. R. Co., N. C., 93 S. E. 750.

19.——Burden of Proof.—In suit for loss of goods before plaintiff can prevail, he must show that in compliance with contract he filed written claim with defendant's agent at point of delivery or origin within four months after reasonable time for delivery had expired.—Smith v. Seaboard Air Line Ry. Co., N. C., 93 S. E. 469.

20.——Freezing.—Where potatoes shipped by rail and steamer had been in steamship company's warehouse at destination to knowledge of consignee more than six days, railroad which handled shipment was not liable for loss by freezing; its carrier's liability having terminated.—Barber v. Detroit, G. H. & M. Ry. Co., Mich., 164 N. W. 377.

21.——Notice of Loss.—A notation by a railway agent on a freight bill as to injuries to shipment was not a compliance with bill of lading stipulation for written notice of loss, required to be filed within a given time.—Taft & Vandyke v. Atlantic Coast Line R. Co., N. C., 93 S. E. 752.

22. **Carriers of Passengers** — Contributory Negligence.—Where passenger's destination was called before train reached that point and passenger alighted and suffered injuries in riding on horseback to her destination, burden of proving that she was guilty of contributory negligence was on the railroad company.—Gulf, C. & S. F. Ry. Co. v. Gentry, Tex., 197 S. W. 482.

23.——Negligence per se.—It cannot be said, as matter of law, that after door of street car had been shut in plaintiff's face, and bell rung for car to start, that plaintiff's duty to save herself from injury did not at once arise.—Sibert v. Detroit United Ry., Mich., 164 N. W. 370.

24. **Chattel Mortgages**—Assignee. — Assignee of a chattel mortgage was entitled to possession of mortgaged property after the debt had fallen due, in action of claim and delivery.—Johnson v. Bray, N. C., 93 S. E. 728.

25. **Commerce**—Burden on.—Levying of income tax, measured by income derived by dock company from fixed charge against railroad for facilitating interstate voyage of Minnesota iron ore to lower lake ports by transferring from railroad to water carrier, held not burden on interstate commerce.—City of Superior v. Allouez Bay Dock Co., Wis., 164 N. W. 362.

26.——Employes.—A servant, employed to provide coal and water for locomotives and to aid in moving them about the yards while on their way from Ohio to Michigan, or from Michigan to Ohio, held employed in interstate commerce.—Guy v. Cincinnati Northern R. Co., Mich., 164 N. W. 454.

27.——Police Power.—Congressional intent to supersede by federal act exercise by state of police powers as to matters not covered by federal legislation is not to be inferred from mere fact that Congress has seen fit to circumscribe and occupy a limited field. (Response of Supreme Court to certified question.)—Louisville & N. R. Co. v. State, Ala., 76 So. 505.

28. **Constitutional Law**—Impairment of Contract.—Traction company's first mortgage on its property held contract, obligation of which, including right to foreclosure, could not be impaired by decree refusing foreclosure on ground of prejudice to bondholders of a company with which it had merged.—Philadelphia Trust Co. v. Northumberland County Traction Co., Pa., 101 Atl. 970.

29.——Interpretation. — The principle, "expressio unius est exclusio alterius," should be applied in the interpretation of provisions of state constitutions relating to legislative department with great caution.—Pine v. Commonwealth, Va., 93 S. E. 652.

30.——Trading Stamps.—Business of trading stamp company which furnished merchants with trading stamps redeemable in merchandise, is, in absence of prohibiting legislation, lawful.—People v. Sperry & Hutchinson Co., Wash., 164 N. W. 503.

31. **Contracts**—Burden of Proof.—Receiver of power company, who contracted to furnish electric current to ice company, could not recover from ice company fixed charge for keeping power in readiness for service whether needed or not, unless it affirmatively appeared he contracted to and did keep such amount of power.—Maxwell v. Missouri Valley Ice & Cold Storage Co., Ia., 164 N. W. 329.

32.——Condition Precedent.—Under contract making engineer's certificate a condition precedent to final payment, the contractor, after engineer had withdrawn, was not required to attempt to obtain any certificate as a condition to final payment.—Mayer Bros. Const. Co. v. American Sterilizer Co., Pa., 101 Atl. 1002.

33.——Estoppel.—Where a stockholder alleged fraud of the directors and officers in attempting to secure control of the stock and to freeze out the other stockholders by giving a mortgage and conniving in its immediate foreclosure, he was not precluded from recovery by his failure to apply to the directors to bring the necessary action to redress the wrong.—Freeman v. Mitchell, Mich., 164 N. W. 445.

34.——Waiver.—Provision of building contract against placing inside woodwork until plastering had dried, held not waived merely because architect's representative saw the work being done and made no protest.—West v. Higgs, Hardee & Laughinghouse, N. C., 93 S. E. 719.

35. **Corporations**—Insolvency.—Sellers of corporate stock who failed to deliver certificates cannot defeat actions for damages on ground that corporation subsequently became insolvent, where it was solvent for more than two years after sale, during which time shares were worth amount paid therefor.—Makris v. Melis, Utah, 167 Pac. 802.

36.——Public Service Corporation.—Code 1904, § 1105e, subsec. 1, providing that the provisions of that chapter shall be construed to apply to all corporations, held, in view of subsections 2a and 2h, not limited to private corporations, but intended to include public service corporations.—Jeffries v. Commonwealth, Va., 93 S. E. 701.

37.——Stockholders.—Majority of stockholders of corporation, in absence of fraud, may manage its affairs, and a court of equity will not interfere at suit of a minority stockholder to control their action.—Moore v. Lewisburg & R. E. Ry. Co., W. Va., 93 S. E. 762.

38. **Courts**—Stare Decisis.—Where parties are different, though question is same, a case is governed by rule of stare decisis, and doctrine of law of case has no application.—Steinman v. Clinchfield Coal Corp., Va., 93 S. E. 684.

39. **Covenants**—Building Restrictions.—A covenant restricting the use of lots to residence purposes and fixing a building line and minimum cost of buildings to be erected thereon may be enforced, though another lot owner had been permitted to use a corner of his lot.—Andre v. Donovan, Mich., 164 N. W. 543.

40.——Eviction.—One holding land under deed of general warranty may, where evicted from part of premises, sue his remote grantor, who warranted premises to his immediate grantor.—Winders v. Sutherland, N. C., 93 S. E. 726.

41.——Failure of Consideration.—Remote grantee cannot recover on covenants of his remote grantor where he knew of failure of consideration for deed, and gave nothing to his immediate grantor other than credit upon past due debt.—Eves v. Curtiss, Wash., 167 Pac. 748.

42. **Creditors' Suit**—Duty of Court.—As it is duty of courts on judicial sale to see that land is sold under most advantageous circumstances, cloud on title to land sought to be subjected to lien of judgment may, under a prayer for enforcement of lien, be removed.—Steinman v. Clinchfield Coal Corp., Va., 93 S. E. 684.

43. **Criminal Law**—Appeal and Error.—Though an indictment under Acts 1916, c. 146, § 7, does not sufficiently charge some of the offenses under §§ 3 and 4 of the act, and the defendants on demand could have required a more specific statement of the cause and nature of their offense, their failure to demand such statement precludes a reversal on the ground that the indictment was insufficient.—Pine v. Commonwealth, Va., 93 S. E. 652.

44.——Variance.—Under indictment for maintaining public liquor nuisance, objection of variance between allegation and proof of ownership is not available after verdict, where no motion was made to strike out the evidence.—State v. Rogers, W. Va., 93 S. E. 757.

45. **Damages**—Exemplary.—It is not necessary to awarding of exemplary damages that plaintiff show wantonness or willfulness; it being sufficient if commission of tort is attended with circumstances of aggravation.—Birmingham Waterworks Co. v. Brooks, Ala., 76 So. 515.

46.——Mitigation.—If railroad passenger tendered conductor cash fare to point where train did not stop merely to provoke altercation, to make case against road, it was matter in mitigation of damages, even if his technical rights as a passenger were violated by the conductor.—Lipman v. Atlantic Coast Line R. Co., S. C., 93 S. E. 714.

47. **Death**—Dependency.—Married children, not legally entitled to support from decedent, were not entitled to bring action under Death Act (How. Ann. St. 1912, §§ 6663 and 6664).—Ormsbee v. Grand Trunk Western Ry. Co., Mich., 164 N. W. 408.

48.——Presumption of Care.—Where a boy breaking through the ice while skating met an instantaneous death and there were no eyewitnesses, there was a presumption that he was in the exercise of due care—Parsons v. E. I. Du Pont De Nemours Powder Co., Mich., 164 N. W. 413.

49.——Proximate Cause.—Where driver of wagon, one of whose wheels struck hole in street, was pitched out and sustained injuries giving him kidney trouble, from which some months after he contracted idiopathic pneumonia and died therefrom, case did not come within Shannon's Code, § 4025, regarding death by wrongful act, since the injury was not proximate cause of death.—City of Nashville v. Reese, Tenn., 197 S. W. 492.

50. **Dedication**—Evidence.—In action to enjoin landowner from closing road over his lands where evidence did not show dedication by defendant or some former owner or by someone expressly authorized or by official authority, judgment for plaintiff will be reversed.—Elliott v. Trisler, Okla., 167 Pac. 755.

51. **Deeds**—Competency of Grantor.—That by deed a father deprived his son, formerly his favorite, of all property, did not invalidate the deed; neither mental incompetency nor undue influence being shown.—Wohlford v. Wohlford, Va., 93 S. E. 629.

52. **Domicile**—Residence.—"Residence" and "domicile" are not synonymous, "domicile" having the larger significance and "residence" depending upon the subject-matter.—Cooper's Adm'r v. Commonwealth, Va., 93 S. E. 680.

53. **Eminent Domain**—Abutting Owner.—Vacation of road or street is not an injury to abutting owners, within constitutional requirements of compensation for private property taken in exercise of rights of eminent domain.—Saeger v. Commonwealth, Pa., 101 Atl. 999.

54. **Estoppel**—By Conduct.—The usual manner of waiving a contract right is by conduct indicating intention to relinquish the right, which may be shown by express declaration, by acts manifesting such intent, or by conduct amounting to an estoppel.—Mayer Bros. Const. Co. v. American Sterilizer Co., Pa., 101 Atl. 1002.

55. **False Pretenses**—Statutory Construction.—Under Rev. St. 1908, § 1849, defining offense of obtaining things of value with intent to defraud, and § 5540, defining "personal property," note reduced to possession by swindler is

a "thing of value" and personal property in the hands of maker.—Knepper v. People, Colo., 167 Pac. 779.

56. **Fixtures**—Conditional Sale.—Where machinery sold under a contract of conditional sale retained its character as personalty, the sale of the realty first by the buyer's lessor and then by the purchaser to the defendant could not affect seller's rights under contract.—Empire Cotton Oil Co. v. Continental Gin Co., Ga., 93 S. E. 525.

57. **Fraud**—Action for.—In action for damages for fraud and deceit regarding title to land received in exchange, plaintiff was not entitled to recover merely because certificate of abstract did not speak truth and he lost title thereby.—McNulty v. Durham, Colo., 167 Pac. 773.

58.——False Representation.—Where plaintiff accepted defendant's note on December 5th for goods theretofore furnished, he could not recover on ground that defendant falsely represented facts on December 14th.—Carville v. Lane, Me., 101 Atl. 968.

59.——Fraudulent Misrepresentation.—To base a charge of fraud on the expression of an opinion, the opinion and belief must be fraudulently misrepresented.—Seymour v. Chicago & N. W. Ry. Co., Ia., 164 N. W. 352.

60. **Frauds, Statute of**—Assumption of Debt.—Where original undertaking of employment is entered upon by a new promisor, his agreement to execute notes in settlement of another's debt to plaintiff and his failure to do so would not relieve him from his obligation on the debt assumed.—Williams v. Garrison, Ga., 93 S. E. 510.

61. **Fraudulent Conveyances** — Invalidity. — Corporate deed of trust held void as to creditors, where mortgagor was permitted by its terms to sell, lease, or use the mortgaged property, subject only to reinvestment of proceeds of sale.—Consolidated Tramway Co. v. Germania Bank, Va., 93 S. E. 572.

62. **Garnishment**—Release. — Where vendor was bound to reimburse vendee because unable to perform contract, was garnisheed, and without notice of vendee's prior assignment, satisfied judgment of garnishment, he is to that extent relieved from liability to assignee.—First Nat. Bank v. Big Bend Land Co., N. D., 164 N. W. 322.

63. **Guaranty**—Avoidance of.—Where salesman and his guarantor, without notice of acceptance of a contract of employment, ordered goods thereunder and guaranteed purchase price as provided by contract, the guaranty was complete, and could not be avoided by employer's failure to furnish such notice.—Hill v. Armour Fertilizer Works, Ga., 93 S. E. 511.

64. **Habeas Corpus**—Unenforceable Ordinance.—A conviction and jail sentence imposed for failure to pay fine imposed for violation of unenforceable ordinance was without force, and the party convicted was entitled to a discharge.—Ex parte Mayes, Okla., 167 Pac. 749.

65. **Husband and Wife**—Agency.—In action to charge married woman with merchandise and fertilizer alleged to have been purchased by her husband as her agent, evidence held insufficient to show his agency to bind her property for payment of the debt.—J. L. Thompson Co. v. Coats, N. C., 93 S. E. 724.

66. **Indictment and Information**—Constitutional Law.—While the Constitution guarantees to every man the right to demand the cause and nature of his accusation, it does not prescribe the manner in which the demand shall be complied with or require that it be by indictment, and it may be by presentment or information or any other manner the legislature may provide.—Pine v. Commonwealth, Va., 93 S. E. 652.

67.——Sufficiency.—An indictment under the prohibition law, charging violation of §§ 3 and 4, held insufficient because not stating the facts constituting the offense.—Pine v. Commonwealth, Va., 93 S. E. 652.

68. **Insurance**—Cancellation.—While ordinarily cancellation of an insurance policy occurs only on mutual assent, where a tornado policy provided for instant cancellation on request of the insured, such request was a cancellation on the instant, even if the insurer absolutely refused to permit cancellation.—Johnson & Stroud v. Rhode Island Ins. Co., N. C., 93 S. E. 735.

69.——Contract.—Marginal clause specifying waters in which ship should be while covered by policy, although using word "warranted," held essential part of contract, avoiding it for breach, and not "warranty" within Laws 1911, p. 197, § 34, a breach of which will not avoid the policy.—Reynolds v. Pacific Marine Ins. Co., Wash., 167 Pac. 745.

70.——Indemnity.—Provision as to notice in policy of title insurance indemnifying mortgagee against damage from filing mechanics' liens, held not to refer to the filing of such liens, but to the proceeding for their enforcement.—Fox Chase Bank v. Wayne Junction Trust Co., Pa., 101 Atl. 979.

71.——Reinsurance.—Holder of life policy in assessment company, reinsured by old line company, who, through old line company's certificate, had notice of existence of reinsurance contract, held unable to accept benefits of part, and to reject other conditions, or plead ignorance of them.—Warren v. Federal Life Ins. Co., Mich., 164 N. W. 449.

72.——Standard Policy.—Where policies sued on are standard policies, provided by statutes of New York, under which defendant insurance companies are chartered, construction given by New York courts to such policies, where not arbitrary or unreasonable, will be followed in an action thereon in Tennessee.—Continental Ins. Co. of New York v. Peery, Tenn., 197 S. W. 487.

73. **Interest**—Maturity.—Note providing, by written part, for payment of interest, and by printed part for interest at 9 per cent from maturity date, the word "date" being written, indicated intention that amount should draw interest only from maturity date.—Hill v. Hart, N. M., 167 Pac. 710.

74. **Intoxicating Liquors** — Statutory Construction.—Const. 1902, § 62, providing that the general assembly shall have full power to enact local option laws, gives no new power to the legislature, but is simply declaratory of the existing law, although it places no restriction whatever upon the leigslative power.—Pine v. Commonwealth, Va., 93 S. E. 652.

75. **Landlord and Tenant**—Renewal of Lease.—Under lease of amusement park to transit

company with first privilege of renewal for additional term, held that lessee had absolute right to renew lease for another term.—Stetler v. North Branch Transit Co., Pa., 101 Atl. 980.

76. **Master and Servant**—Non-Suit.—Where cause of action, if any, arose under federal Employers' Liability Act, and petition was drawn under state act, the case pleaded was not proven, and the case proven was not pleaded, and court properly granted a non-suit.—Williams v. Western & A. R. Co., Ga., 93 S. E. 555.

77.——Common Carrier.—Where electric railway operated several construction trains daily over track where its employe riding on flat car was injured, it was as important for railway to exercise reasonable care to protect employes from injury as though it had been common carrier.—Adamski v. Michigan Ry. Engineering Co., Mich., 164 N. W. 402.

78. **Mortgages**—Priority. — Indebtedness incurred by receivers of merged street railway company had no priority over bonds secured by mortgages of subsidiary company, if such indebtedness could be paid out of funds arising from receivers' operation of road.—Philadelphia Trust Co. v. Northumberland County Traction Co., Pa., 101 Atl. 970.

79. **Municipal Corporation** — Delegation of Power.—Where city council ordered the city engineer to submit plans for two kinds of paving, and he complied, and thereafter the council called for bids, accepted the lowest bid, and by ordinance determined the character, kind and extent of the improvements, the council did not delegate its functions to the city engineer.—Lanice v. City of Portland, Ore., 167 Pac. 587.

80.——Special Assessment.—Where a city orders a local improvement to be paid for by special assessment, duty to put necessary machinery in motion to raise funds devolves upon city, and failure to perform duty creates a general liability, giving rise to action ex delicto against city for damages.—Morris v. City of Sheridan, Ore., 167 Pac. 593.

81. **Negligence**—Trespasser.—A boy skating on a navigable stream and breaking through where the ice was weakened by the discharge of warm water into the stream, held not a trespasser.—Parsons v. E. I. Du Pont De Nemours Powder Co., Mich., 164 N. W. 413.

82. **Partnership**—Agreement.—An agreement between owner of timber and right-of-way, person constructing lumber road thereon, and person who was to cut the timber and operate the road, held to create a partnership.—Mitchel v. Elizabeth River Lumber Co., N. C., 93 S. E. 464.

83. **Perpetuities**—Suspending Alienation. — Will giving income of residuary estate to children for 25 years and giving the property to grandchildren, and providing that it should be kept intact for 25 years, held to violate Comp. Laws 1897, §§ 8796, 8797, as to suspending the power of alienation.—Otis v. Arntz, Mich., 164 N. W. 498.

84. **Railroads**—Look and Listen.—Decedent, who stopped his team and looked and listened about 90 feet from grade crossing, but who did not stop before reaching track, where he could have seen approaching train for three-quarters of a mile, was guilty of contributory negligence. Reigner v. Pennsylvania R. Co., Pa., 101 Atl. 995.

85. **Receivers**—Executory Contract.—Receiver for corporation was not bound to adopt company's executory contract to furnish electric current.—Maxwell v. Missouri Valley Ice & Cold Storage Co., Ia., 164 N. W. 329.

86.——Interest of.—Receiver of insolvent corporation takes only its interest in the property, subject to all valid liens against it, and can set up no rights against the claims which the corporation could not have set up.—Philadelphia Trust Co. v. Northumberland County Traction Co., Pa., 101 Atl. 970.

87. **Rewards**—Fraud and Collusion. — Evidence held insufficient to show fraud and collusion by the contestants submitting the best solutions in a puzzle contest, though they were related, their methods of procedure were the same, and their results only slightly variant.—Statesman Pub. Co. v. Foltin, Ore., 167 Pac. 782.

88. **Sales**—Contract.—In action for goods sold under sales agency contract requiring purchase of $40,000 worth of goods, defendant could not contend that sales be computed on prices received by it on its sales, where parties had construed contract to mean that amount was to be computed on amount of sales by plaintiff to defendant.—Scandinavia Belting Co. v. Macan, Jr., Co., Pa., 101 Atl. 997.

89.——Fraud.—Where purchaser of automobile contracted for new car in good condition, and car delivered was not such, and seller knew it was materially damaged when he received purchaser's note and checks in payment, there was a fraud entitling purchaser to rescind.—Taylor v. First Nat. Bank, Wyo., 167 Pac. 707.

90.——Warranty.—Contract to "furnish properly all castings needed by" a manufacturer of a patented hay press "whether of the exact patent now used or not" held not a warranty as to kind and quality of particular goods to be furnished.—Williams Mfg. Co. v. J. S. Schofield's Sons Co., Ga., 93 S. E. 527.

91. **Specific Performance**—Substantial Compliance.—In contractor's suit for specific performance by sale of lands by land commissioner, where it appeared that plaintiff's object was substantially accomplished by the judgment, it could not complain of court's failure to award more land to him.—Rio Mimbres Irr. Co. v. Ervein, N. M., 167 Pac. 723.

92. **Statutes**—Saving Clause.—In amending a statute the legislature may save the old statute for specified purposes, by an appropriate saving clause in the amending act.—Board of Education of City of Roswell v. Citizens' Nat. Bank of Roswell, N. M., 167 Pac. 715.

93. **Street Railroads**—Negligence per se.—Automobile driver approaching street railway track where vision is obstructed, at such speed as to make it impossible to stop before track is reached without taking any precautions to ascertain whether car is coming, is negligent as matter of law.—Donlin v. Detroit United Ry., Mich., 164 N. W. 447.

94. **Trover and Conversion**—Evidence.—Purchaser of automobile, who contracted for new car in good condition, and person associated with plaintiff in selling car, held not liable to plaintiff for conversion of note and checks given in payment, because, when purchaser intimated to plaintiff's associate damaged condition of car, latter returned note and checks.—Taylor v. First Nat. Bank, Wyo., 167 Pac. 707.

95. **Trusts** — Instrument Creating. — Letter subscribed by trustee, whether addressed to or deposited with cestui, will be sufficient to establish trust when subject, object and nature of trust and parties and their relations to it and each other appear with reasonable certainty.—Viele v. Curtis, Me., 101 Atl. 966.

96. **Usury**—Condition Precedent.—Under Rev. Laws 1910, § 1005, one seeking to recover usurious interest paid must make written demand for its return, and on failure to return must bring action within two years after maturity of usurious contract.—First State Bank v. Pool, Okla., 167 Pac. 760.

97. **Vendor and Purchaser**—Meeting of Minds. —Where vendor and purchaser under contract of sale of "J. T. A. place," disagreed as to whether a small tract was included, held, that the minds of the parties never met with any definite understanding.—West v. Cave, Wash., 167 Pac. 747.

98. **Waters and Water Courses**—Public Service Company.—Plaintiff had no right to be supplied with water through joint service pipe, when other users were in arrears with their water rent and on demand had refused to pay. —Birmingham Water Co. v. Brooks, Ala., 76 So. 515.

99. **Wills**—Appeal and Error.—On appeal to superior court from decree of the probate court admitting a will to probate, the special statutory issue as to whether the will was a valid will was the sole issue.—South Norwalk Trust Co. v. St. John, Conn., 101 Atl. 961.

100.——Undue Influence. — Mere fact that testator left more to his son who lived near him and with whom he had been in closer relation for many years, or that he left more to his four grandsons than to both his son and daughter, is no evidence of undue influence.—In re Fay's Estate, Mich., 164 N. W. 523.